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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO BARRETO, Defendant and Appellant.	H039448 (Monterey County Super. Ct. No. SS101653)

Defendant Rodolfo Barreto appeals from a judgment of conviction entered on jury verdicts finding him guilty of aggravated sexual assault on a child by forcible oral copulation (Pen. Code, § 269, subd. (a)(4)) and forcible lewd and lascivious acts upon a child under 14 years of age (*id.*, § 288, subd. (b)(1)). All of the charges arose from a family gathering on July 4, 2010, at which the victim (victim), the then-12-year-old cousin of defendant's wife, says defendant molested and raped her.

On appeal, defendant challenges the sufficiency of the evidence supporting the guilty verdicts and claims prejudicial evidentiary error, discovery error, and cumulative error. He also contests the penalty assessments imposed in connection with his conviction. We will modify the judgment to reduce the penalty assessments by $30 and will direct the trial court clerk to prepare an amended abstract of judgment that sets forth the amounts and statutory bases of the sex offender fine and each of the penalty assessments imposed. We will affirm the judgment as modified.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Charges Filed Against Defendant

On July 19, 2010, the Monterey County District Attorney filed an information charging defendant with committing various sex offenses against victim on July 4, 2010. An amended information, filed on May 15, 2012, charged defendant with aggravated sexual assault on a child by forcible rape (Pen. Code, § 269, subd. (a)(2), count 1), aggravated sexual assault on a child by forcible oral copulation (*id*., § 269, subd. (a)(4), count 2), three counts of lewd or lascivious acts on a child under age 14 (*id*., § 288, subd. (a), counts 3-5), and five counts of forcible lewd or lascivious acts on a child under age 14 (*id*., subd. (b), counts 6-10). The amended information alleged in connection with counts 3 through 10 that defendant engaged in substantial sexual conduct with a child under 14 years of age (*id*., § 1203.066, subd. (a)(8)).

After the parties presented their evidence at trial, counts 4, 9, and 10 and the substantial sexual conduct allegation were dismissed at the prosecutor's request.

B. Evidence Adduced at Trial

The following evidence was adduced at trial over the course of 20 days of testimony between October 15, 2012, and November 13, 2012.

1. The Victim

Victim was 15 years old at the time of trial. She testified that the first time defendant--who is the husband of her cousin Erica--touched her inappropriately was in the hot tub at her aunt's house. Defendant put her on his lap and she could feel his penis, which made her uncomfortable. Victim did not recall when this incident occurred.

Defendant's counsel objected to the questioning about the hot tub incident and a side bar was held. Defense counsel complained that the defense had not been provided discovery regarding the alleged incident. The prosecutor could not say whether the recorded interview in which victim discussed the hot tub incident had been provided to the defense. No further questioning regarding the hot tub incident occurred, and

defendant moved for discovery sanctions. The court declined to admonish the jury that the hot tub testimony was untrue or that victim's testimony about it would be stricken as a sanction for late disclosure, as defendant requested. But the court granted defendant's alternative request to admonish the jury to disregard the testimony. At the conclusion of victim's testimony, six days after she testified about the hot tub incident, the court ordered that testimony stricken and admonished the jury not to consider it.

Victim also testified that defendant touched her inappropriately when she and her brother (brother) were staying with defendant and Erica because their mother (mother) was out of town. Victim was 12 years old and in the seventh grade at the time. Early in the morning, defendant came downstairs and lay down with victim on the couch where she was sleeping. He put his hand under her pajama top and rubbed her chest. Victim asked him twice to stop, at which point he went back upstairs.

That same year, defendant inappropriately touched victim's rear while they were walking the dog with brother and Erica. Victim testified that she and defendant were walking behind Erica and brother when defendant placed his hand on her rear for a couple of seconds and curled his fingers.

As to July 4, 2010, victim testified that family members were going to the beach. Mother was not feeling well, so defendant took victim and brother to the beach. Victim wore her bathing suit and brought a gym bag containing a change of clothes. After a few hours at the beach, everyone returned to the home of victim's uncle, Hector. Defendant offered to take victim and brother to a pool near his house. The three went to the pool and swam. While brother was playing with friends, defendant twice took victim's hand and placed it on his penis over his swimsuit.

Victim, brother, and defendant returned to defendant's house. Defendant told brother to take a shower. Victim testified that after brother went upstairs, defendant told her to get on his lap. When she did so he moved the crotch of her bathing suit aside and put his finger insider her vagina. Victim stood up when he did so. Brother then called

down and asked victim to check to see if the bathroom door was locked. She did so. On her way downstairs she encountered defendant on the stairs. He picked her up, threw her over his shoulder, and took her into his bedroom. When he put her down, she told him she wanted to go downstairs. He grabbed her and told her no. She walked towards the door and he again grabbed her by the arm. He pulled her back and kissed her on the lips, forcing her mouth open with his tongue. Victim pulled back and pushed off defendant's chest. Defendant then placed his hands on victim's shoulders, moved her to the bed, and pushed her down so that she was lying on the bed with her legs dangling off the side. Defendant pulled victim's bathing suit aside and licked her vagina. She was scared and covered her eyes. She then felt his penis go into her vagina. Victim testified that defendant took his penis out and put it back in at least once. Neither victim nor defendant said anything as this occurred. The bedroom door remained open. Victim testified that defendant stopped when he told her he heard a car door slam. He got up and got in the shower and told victim to go answer the door. She opened the front door and other family members came in, including her aunt Donna, uncle Hector, and Erica.

Victim testified on direct examination that, after the family arrived, she changed out of her bathing suit, which she put in her gym bag. On cross-examination, victim stated she put on clothes over her swimsuit when the family arrived, but did not remove her swimsuit until she got home that night. The family set off fireworks. Eventually, everyone went home and a family friend, Irene Dameron, drove victim and brother home.

Victim testified that on July 5, 2010, she, brother, their aunt (Leticia M.), and mother went to breakfast at Margie's Diner. Victim obtained defendant's phone number from Leticia M.'s phone. The four went to Target. Either at or en route to Target, victim sent defendant multiple text messages without response. One read "Oh, I'm sorry. But I don't feel comfortable with what you did to me yesterday. I'm your little cousin, and you raped me. I am planning on telling my mom that you raped me toni[ght]." Another read "Text back or I will tell my mom right now. Text back." Victim also called defendant

from Target; he answered and she told him she "was going to tell [her] mom because [she] was uncomfortable with what he did." He responded that he thought she wanted it to happen, she should not tell her mother, and he loved her. Phone records showed victim sent defendant text messages between 5:00 and 7:00 p.m. on July 5, 2010.

After victim spoke with defendant by telephone while at Target, mother saw that she was crying. Mother was concerned and arranged to meet up with Moncada and brother later so that she and victim could leave the store. In the car, victim told mother that defendant had raped her. At home, mother had victim write down what had happened the day before.

After discussing the situation with a friend, mother called the police. Victim told one of the officers what had happened. Victim then went to the hospital where a sexual assault exam was performed early the following morning.

On direct examination the prosecutor elicited testimony to the effect that victim no longer sees her aunt Donna, her uncle Hector, Erica, or defendant. Over defense counsel's objection as to relevance, victim further testified that she had seen Donna and Hector only once since the incident, but had not spoken with them. She also testified she had dinner with Erica, her new baby, and mother one time since the incident. Outside the presence of the jury, defense counsel argued that this testimony was designed to elicit sympathy for victim, which was improper because a prior judge had admonished defendant's family not to have any contact with victim. The court ruled the testimony was relevant to whether any family members had attempted to influence victim's testimony.

2. Mother

Mother testified that she did not feel well on the morning of July 4, 2010, because she had anxiety and "felt some depression kicking in." On July 5, 2010, mother, victim, brother, and Leticia M. went to Margie's Diner for a late lunch around 1:00 p.m. At Margie's Diner, victim asked mother for defendant's cell phone number and mother gave

it to her. Victim also asked to go to confession, which was out of the ordinary. After eating, they went to Target. While mother was paying at Target, victim began to cry and said she needed to speak to her. Mother testified that it was about 7:00 p.m. at this point. Mother and victim left; brother stayed with Leticia M.

In the car, victim told mother defendant had raped her. The two went home where victim described the events of the prior day. Victim was not able to say certain things out loud and wrote them down instead.

Mother called her friend, Ofelia Benavidez, who came over and then drove around with mother.[1] While mother and Benavidez were driving around, victim was with her cousin (Y.), Leticia M.'s daughter. Mother and Benavidez met up with a friend and former police detective, who advised mother to call the police, which she did. An officer came to mother's home shortly thereafter and spoke to victim. Mother testified she gave victim's swimsuit to the officer. She could not remember where she got it from, but she knew it had not been washed.

3. Deputy Sheriff Erik Schumacher

Erik Schumacher, a deputy sheriff with the Monterey County Sheriff's Office, testified that at 10:28 p.m. on July 5, 2010, he responded to a call regarding a sexual assault reported by mother. He took a statement from victim at victim's home. At that time, victim told Deputy Schumacher that defendant had placed her hand on his privates multiple times while they were at the pool on July 4. According to Deputy Schumacher, victim further reported that, back at the house, defendant had asked her to sit on his lap and had placed his hand inside her swimsuit and rubbed her vagina. Victim also told the deputy that her brother had gone upstairs to shower and she went upstairs as well. On her way down, defendant blocked her way, kissed her, and tried to put his tongue in her

[1] Benavidez testified that mother called her between 3:00 p.m. and 5:00 p.m. on July 6, 2010.

mouth. Defendant then picked her up and carried her to the bedroom. He put her down on the bed and held her down with his arms. Defendant then pulled her towards the edge of the bed, moved aside the crotch of her swimsuit, and licked her vagina. Next, in victim's words, defendant "raped" her. Victim clarified that she meant defendant put his penis in her vagina; he twice removed his penis and reinserted it. Defendant stopped when he heard a car door close. Victim told Deputy Schumacher she later took her bathing suit off and put it in a bag. Deputy Schumacher testified that mother retrieved a travel bag containing the swimsuit and victim placed the suit in an evidence bag.

At approximately 5:20 a.m. on July 6, 2010, Deputy Schumacher and a number of other deputies went to defendant's home. When defendant answered the door, Deputy Schumacher asked if he knew why they were there. Defendant responded that he did. The deputies then arrested defendant.

Before Deputy Schumacher testified regarding defendant's arrest, defendant moved to exclude testimony regarding the statements he made just prior to his arrest on *Miranda*[2] and other grounds. The court denied that motion.

4. Testimony Regarding Victim's Sexual Assault Exam

i. Sheree Goldman

Sheree Goldman, a SART[3] nurse, testified that she performed a sexual assault exam on victim at approximately 5:00 a.m. on July 6, 2010. Goldman testified that victim was in the early stages of puberty and that her hymen was intact. Goldman opined that, at victim's age, her hymen could stretch around an object like a penis without injury. Goldman found no visible evidence of a sexual assault. She noted that the absence of

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] SART stands for Sexual Assault Response Team. (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1463.)

visible injury is the most common outcome of a SART exam. Goldman could not rule out a sexual assault based on the exam.

ii. John Stirling, M.D.

John Stirling, M.D., a pediatrician and director of the Center for Child Protection at Valley Medical Center, testified as an expert in sexual assault examinations for the prosecution. Dr. Stirling testified that it is "pretty well established" that a 12-year-old can suffer no visible injuries from a sexual assault. He opined that a sexually inexperienced girl might describe her vagina as having been penetrated when in fact the penis penetrated only the lips and not the anatomical vagina.

iii. James Crawford, M.D.

James Crawford, M.D., the medical director of the Center for Child Protection at Children's Hospital in Oakland, testified as an expert in child sexual abuse for the defense. He opined that if the penis of an adult male penetrated the anatomical vagina of a girl at victim's stage of puberty it would likely cause trauma, including tearing of the hymen. Such penetration was inconsistent with the results of victim's SART exam. He stated that in most child sexual abuse cases vulvar coitus occurs, where the penis goes between the lips of the vagina but does not penetrate the anatomical vagina.

6. Christina Gunter

Christina Gunter, an investigator with the Monterey County District Attorney's Office, testified about a phone call between defendant and his wife, Erica, that took place while defendant was in the Monterey County jail. As the operator advised at the start of the call, the call was recorded. At the beginning of the call defendant said, "Um, screwed up our entire, well, my entire life and screwed up your entire life and everybody's, so I'm sorry." When Erica asked whether defendant had been charged, he said, "Yeah, they, well, they charged [me] with a bunch of things." Erica responded, "But none of it's true, right?" Defendant continued "They charged [me] with forcible rape, oral copulation with

a person under 14 years old . . . ." Erica then said, "Okay, let's not talk over the phone 'cause they're recording it . . . ."

7. DNA Evidence

i. Linh Dang

Linh Dang, a criminalist with the Department of Justice, testified for the prosecution as an expert in the area of serology and bioscreening. Dang testified that she examined the swimsuit victim was wearing on July 4, 2010. She swabbed the interior crotch of the bathing suit and the interior lining of the leg openings. Dang testified that she did not swab any part of the exterior of the suit. The swabs tested negative for semen, sperm, and blood. Dang sent the swabs to the lab for DNA testing.

Dang later made random cuttings along the center of the crotch area and tested them for amylase. Some of the cuttings tested positive for a low level of amylase, which Dang testified could indicate the presence of a small amount of saliva or vaginal fluids, semen, urine, feces, breast milk, or perspiration. Dang also testified that saliva is generally associated with elevated levels of amylase as opposed to the low levels found on the suit.

ii. Angela Meyers

Angela Meyers, a criminalist at a Department of Justice DNA laboratory, testified for the prosecution as an expert in forensic and DNA typing. Meyers tested the swabs of the interior crotch and leg openings of victim's swimsuit for DNA. She found a mixture of DNA from one male and one female that was consistent with victim and defendant's DNA. According to Meyers, "The probability that a random, unrelated individual would by chance be included as the male contributor to this mixture is estimated to be . . . one in 3.0 sextillion for Hispanics. This provides strong evidence that Rodolfo Barreto is the source of the male DNA detected in this mixture."

The DNA mixture consisted of six nanograms of DNA, with approximately equal contributions from the male and the female. Meyers opined that the best explanation for

the source of victim's DNA was vaginal fluid, which is "a rich source of DNA." Given the one-to-one mixture of male to female DNA, she opined that the source of the male DNA was "equally rich." Meyers doubted that the amount of male DNA on the suit could have been transferred merely through touching because skin cells sloughing off the fingers would not be as rich a source of DNA as vaginal fluid. She opined that defendant's saliva would be a good explanation for the results, as saliva is a rich source of DNA.

iii. Marc Taylor

Marc Taylor, a forensic scientist at a private DNA testing laboratory, testified for defendant as a DNA typing expert. He opined that vaginal fluid was not the only possible source of victim's DNA, particularly because Dang swabbed along the leg openings of the suit where one would not expect to find vaginal fluid. He opined that victim may have transferred three nanograms of her DNA to the inner leg lining by wiping her nose and then adjusting her suit. Taylor further opined that the three nanograms of defendant's DNA could have been transferred by his hands, by throwing victim over his shoulder, or if the suit came into contact with the floor of a bathroom defendant used regularly. Taylor testified that he would expect to find more than three nanograms of male DNA if the DNA was transferred as a result of oral copulation, but conceded that the amount of DNA found on the swimsuit could degrade if it had been stored wet prior to testing.

8. Irene Dameron

Irene Dameron, a friend of Donna's who drove victim and brother home after the Fourth of July festivities at defendant's home, testified for defendant. Dameron testified that victim was not behaving unusually on July 4, 2010.

9. Tara Depue

Tara Depue, a long-time friend of defendant's wife, Erica, and sometime substitute teacher for victim, testified for the defense. The prosecutor objected when the defense

indicated it intended to elicit testimony from Depue regarding victim's character. Following an untranscribed sidebar, the prosecutor argued—outside the presence of the jury—that sections 786, 787, and 1103 of the Evidence Code[4] do "not permit the defense just to attack the character of the victim by bringing in other witnesses to . . . comment on her character traits." The prosecutor later argued the testimony should be excluded under section 352. With respect to section 1103, defense counsel explained that he did not intend to question Depue regarding victim's sexual conduct or sexuality. As to section 787, defense counsel stated he would not elicit testimony regarding specific instances of conduct. He explained Depue would testify that victim "appeared to be needing attention" in the months prior to July 4, 2010. Apparently in reference to section 786, defense counsel acknowledged the testimony regarding victim's attention-seeking was not "related to honesty and veracity."

The court declined to exclude the evidence based on sections 352 and 1103. Citing sections 786 and 787, the court excluded "any testimony about the opinion that [victim] is attention seeking or needy in some way [because] that is not going to honest or veracity. . . . [¶] She may offer an opinion as to honesty and veracity . . . [but] it may not be based on specific instances of conduct."

Depue testified she believed victim was capable of making up false accusations of sexual assault.

10. Donna

Victim's aunt Donna testified for defendant that nothing appeared to be bothering victim on the evening of July 4, 2010. Donna testified that she had avoided contact with victim since the incident because she was under the impression a judge had prohibited such contact.

[4] Unspecified statutory references are to the Evidence Code.

The prosecutor objected when defense counsel asked Donna whether she observed victim to be someone "wanting a father in her life." Outside the presence of the jury, the court concluded that "attention seeking and seeking a father figure . . . [are not] traits of character which are properly the subject of character witness testimony." And the court ruled under section 352 that percipient witness testimony that victim had told Donna she wanted a father figure throughout her childhood was not "probative relative to the time consumption and confusion of the issues."

11. Leticia M.

Leticia M. testified that she met mother, brother, and victim at Target at about 1:00 p.m. on July 5, 2010. She did not recall ever going to Margie's Diner that day. While at Target, Leticia M. noticed victim was not acting like herself; instead, she was quiet and texting a lot. Leticia M. mentioned the behavior to mother.

12. Expert Testimony on Child Sexual Abuse Accommodation Syndrome

On rebuttal, the prosecution presented expert testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS) to rebut testimony regarding victim's demeanor and behavior towards defendant following the alleged molestation. The prosecution did so over defendant's objection that such evidence lacks a scientific basis, was irrelevant, was inadmissible under section 352, would invade the province of the jury, and was not necessary--given the growing societal awareness of child sexual abuse--to disabuse jurors of misconceptions regarding how a child reacts to molestation.

In addition to allowing the prosecution to call a CSAAS expert, the court permitted defendant to call its own CSAAS expert in sur-rebuttal. Before each expert testified, the court instructed the jury that it could consider their testimony "only in deciding whether [victim's] conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony."

The prosecution's expert described four elements of CSAAS. The first element he described is secrecy, which refers to the child delaying disclosure of abuse due to threats,

intimidation, manipulation, the child's feelings for the abuser, shame, or embarrassment. The second element, helplessness, refers to the child not acting to stop the abuse. The third element, entrapment and accommodation, refers to coping mechanisms children use to deal with abuse they cannot stop. The fourth element is delayed disclosure of either the abuse itself or details of it.

Defendant's expert criticized CSAAS as being unsupported by scientific evidence and for not providing a basis for distinguishing between actual cases of abuse and false accusations.

Both experts testified that CSAAS is not a diagnostic tool for determining whether abuse occurred.

D*. *Exclusion of Evidence of Mother's July 3 Fight With Her Boyfriend

One of the defense theories at trial was that victim fabricated the allegations against defendant to get attention. In support of that theory, the defense sought to introduce evidence that mother and her boyfriend, Anthony B., fought on the night of July 3, 2010. According to the defense, Anthony B. was a father figure and victim feared losing him. She lied about defendant molesting her to keep Anthony B. from leaving and to focus mother's attention on her.

The court held a section 402 hearing to determine whether the defense should be permitted to elicit testimony regarding the July 3, 2010 fight. At that hearing, mother testified that in July 2010 she had been in a relationship with Anthony B. since January 2009. Mother and Anthony B. had previously had a romantic relationship, which had ended for a period of about five years, before they began seeing one another again in 2009. The relationship was a rocky one and the couple fought regularly, although they tried not to do so in front of the children.

Mother and Anthony B. argued on the night of July 3, 2010, and she locked him out of her bedroom. Mother could not recall if they raised their voices during the fight and did not know whether victim was aware of the argument. Mother denied the fight

caused the anxiety she felt the following day, explaining that she had seen a doctor for ongoing anxiety a month before the argument with Anthony B. She conceded, however, that the rockiness of the relationship may have caused her anxiety in general.

The trial court excluded the evidence under section 352. The court indicated the defense had failed to show any "temporal and perception nexus between [victim] and any argument involving her mother the night of July 3d of 2010," such as whether victim even was aware of the argument.

E. *Verdict*

The jury deliberated for a day and a half. It returned guilty verdicts on count 2 (aggravated sexual assault of a child by forcible oral copulation), count 6 (forcible lewd act upon a child--kissing in house), and count 7 (forcible lewd act upon a child--licking crotch area). The jury was unable to reach a verdict on count 1 (aggravated sexual assault of a child by forcible rape), count 3 (lewd act upon a child--swimming pool), count 5 (lewd act upon a child--lap/rub), and count 8 (forcible lewd act upon a child--penis to crotch).

F. *Sentencing*

On March 13, 2013, the trial court sentenced defendant to a term of 15 years to life on count 2 and a concurrent term of six years on count 6. The court stayed sentence on count 7 under Penal Code section 654. The court also imposed a $300 sex offender fine pursuant to Penal Code section 290.3 with $930 in penalty assessments, for a total of $1,230.

II. DISCUSSION

A. *Evidence of Mother's Fight With Anthony B.*

Defendant argues the trial court's exclusion of evidence of mother's July 3, 2010 fight with Anthony B. was prejudicial error. According to defendant, the court not only abused its discretion under section 352, but also violated his Sixth Amendment right to present a defense and his Fifth Amendment due process right to a fundamentally fair trial.

1. Legal Principles and Standard of Review

Only relevant evidence is admissible. (§ 350.) The Evidence Code defines "relevant evidence" broadly as "evidence . . . having *any tendency in reason* to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210, italics added.) " '[T]he trial court has broad discretion to determine the relevance of evidence.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

A trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) For purposes of section 352, evidence is "prejudicial" if it " ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) " ' "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." ' " (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

"On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

ii. Exclusion of Evidence of Mother's Fight With Anthony B. Was Not An Abuse of Discretion

Defendant's theory is that the fight between mother and Anthony B. caused victim to fear losing both her mother's attention and Anthony B. as a father figure. In an effort to refocus her distracted mother's attention on her and to prevent a breakup of mother's

relationship, victim made false accusations against defendant.

That theory would be viable only if victim was aware of the fight. The only evidence supporting an inference that victim was aware of the fight is her testimony that she slept in mother's room on the night of July 3, 2010. Defendant speculates that if victim was in mother's room, she would have been aware that Anthony B. was locked out because of a fight with mother. But mother denied that victim slept in her room on July 3, 2010, and she (mother) testified that she did not believe victim was aware of the fight. And defense counsel did not question victim about any argument between mother and Anthony B.[5]

Under these circumstances, the trial court reasonably could have concluded that mother's testimony about the fight had only "speculative relevance" and that "its marginal probative value was outweighed by the time necessary to explain the point and by the potential that the evidence would confuse the jury." (*People v. Cornwell* (2005) 37 Cal.4th 50, 81, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Babbitt* (1988) 45 Cal.3d 660, 684 ["exclusion of evidence that produces only speculative inferences is not an abuse of discretion"].) That "conclusion leads us to reject defendant's claim that the trial court's ruling violated his right to present a defense. [Citations.] Although a defendant has the general right to offer a defense through the testimony of his or her witnesses, 'a state court's application of ordinary rules of evidence--including the rule stated in Evidence Code section 352--generally does not infringe upon this right.' " (*People v. Linton* (2013) 56 Cal.4th 1146, 1183.)

We likewise reject defendant's contention that the exclusion of evidence regarding the argument violated his due process rights. For the reasons discussed above, the

[5] The section 402 hearing and ruling regarding the evidence was held during the trial, after victim had testified.

exclusion of that evidence was not " 'so prejudicial as to render the defendant's trial fundamentally unfair.' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

B. Testimony Regarding Victim's Need for Attention

Defendant maintains the trial court erred in refusing to allow defense counsel to elicit testimony from Depue and Donna that victim exhibits the character traits of being needy for attention and desirous of a father figure. With respect to Depue, the trial court reasoned the testimony was inadmissible under sections 786 and 787 because "any testimony about an opinion that [victim] is attention seeking or needy in some way, that is not going to honesty or veracity." Similarly, the court excluded Donna's testimony on the theory that "attention seeking and seeking a father figure . . . [are not] traits of character which are properly the subject of character witness testimony."

Defendant contends Depue and Donna's testimony was admissible because it evinced a motive to lie and that its exclusion violated his due process rights. He does not explain whether or why the court's application of sections 786 and 787 was wrong. Nor do the People make an argument based upon the law governing the admission of character evidence in criminal cases. Instead, they argue the court did not abuse its discretion because, in their view, no logical connection exists between victim's need for attention and her allegedly false accusation of sexual assault.

1. Legal Principles

Under the Evidence Code, the credibility of a witness may be attacked or supported by any party. (§ 785.) Generally, section 786 prohibits attacking or supporting a witness's credibility with "[e]vidence of traits of his character other than honesty or veracity, or their opposites." However, the 1982 adoption of the "Truth-in-Evidence" provisions of article I, section 28, subdivision (d) (now subdivision (f)(2)) of the California Constitution rendered section 786 inapplicable to criminal cases. (*People v. Stern* (2003) 111 Cal.App.4th 283, 297-298 (*Stern*); *People v. Harris* (1989) 47 Cal.3d 1047, 1081 ["section 28[, subdivision] (d) effected a pro tanto repeal of Evidence Code"

§§ 786, 787, 790], disapproved on another ground in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.) Accordingly, in a criminal trial, a witness's credibility may be attacked or supported with evidence of character traits other than honesty or veracity so long as those traits are relevant to the witness's believability. (*Stern, supra,* at pp. 297-298.)

We review the court's exclusion of Depue and Donna's testimony that victim exhibits the character traits of being needy for attention and desirous of a father figure for abuse of discretion. (*People v. Hovarter, supra,* 44 Cal.4th at pp. 1007-1008.)

2. Analysis

"Subject to Evidence Code section 352, the controlling issue . . . is, pursuant to article I, section 28, subdivision (d) of the California Constitution, the relevance of" victim's character traits for neediness and wanting a father figure, to the extent those traits affect her credibility. (*Stern, supra,* 111 Cal.App.4th at p. 298.) Given the court's proper exclusion of any evidence of mother's fight with Anthony B., evidence that victim was desirous of a father figure was not relevant. We shall assume evidence of victim's character for neediness was relevant and should have been admitted. Even so, the trial court's assumed error is reversible only if it was prejudicial. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 357.) There are two standards for assessing prejudice--the harmless-beyond-a-reasonable-doubt test (*Chapman v. California* (1967) 386 U.S. 18, 24) that applies to errors that violate the United States Constitution, and the reasonable-probability test (*People v. Watson* (1956) 46 Cal.2d 818, 836-837) that applies to error under California law. Defendant argues the exclusion denied him his due process right to present a defense, such that *Chapman* applies. The People maintain there was no due process violation and argue lack of prejudice under *Watson*.

"As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' " (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) "[C]ompletely excluding evidence of an accused's defense theoretically could rise to this level, . . . 'but only a rejection of some

evidence concerning the defense' " would not. (*Id*. at p. 1103.)

Here, there was other evidence negatively impacting victim's credibility, including inconsistencies in the details of her various statements regarding the events of July 4, 2010,[6] and Depue's testimony she believed victim was capable of making up false accusations of sexual assault. As defendant concedes, that evidence supported his fabrication defense. Accordingly, the trial court's ruling did not preclude defendant from presenting a defense; therefore, the proper standard of review is that enunciated in *Watson*.

DNA evidence corroborated victim's testimony regarding the oral copulation charged in counts 2 and 7. In particular, defendant's DNA was found on the interior crotch and leg area of victim's swimsuit. The prosecution's expert opined that saliva was the most likely source of defendant's DNA. While the defense expert disagreed, the jury appears to have credited the prosecution expert. As to count 6, victim consistently described defendant kissing her on the lips and forcing his tongue into her mouth prior to the rape. She provided that description to her mother and Deputy Schumacher on July 5, 2010, and on both direct and cross-examination.

The excluded testimony had little probative value. For one thing, it came from defendant's mother-in-law and his wife's best friend, both of whom had a motive to lie--to protect defendant. Even if jurors believed victim was needy, they may have concluded defendant targeted her for that reason. Moreover, while a need for attention might prompt false accusations of sexual abuse, not every needy child makes such accusations.

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[6] For example, victim testified both that she removed her swimsuit at Barreto's house and that she did not remove it until she got home. In some accounts, she said her brother was in a downstairs bathroom when Barreto digitally penetrated her; in others, she said he was upstairs showering. With respect to the rape, victim variously said Barreto pulled down his suit, put his penis through the fly of the suit, and that she did not know how he exposed his penis. On one occasion she said the rape stopped when the doorbell rang; otherwise, she said it was when a car door slammed.

As such, the inference that victim made a false accusation because she was in need of attention was weak. In light of the strength of the evidence of defendant's guilt as compared to the limited probative value of Donna and Depue's testimony that victim was needy, it is not reasonably probable that the verdict would have been more favorable to the defense had the trial court admitted their testimony.

C. Evidence Regarding Victim's Lack of Contact With Her Family

Defendant complains the trial court should have excluded victim's testimony that she had seen her cousin Erica and aunt Donna and uncle Hector (Erica's parents) only once since July 4, 2010, as unduly prejudicial under section 352. According to defendant, the testimony had no relevance and likely aroused sympathy for victim. The People respond that the testimony bore on victim's credibility because it showed she had not retracted her allegations despite any familial pressure or ramifications.

We agree the testimony was relevant to victim's credibility. Evidence that victim had limited contact with those closest to defendant eliminated the possibility that they had attempted to influence her testimony. Donna's testimony that she had limited her contact with victim because of a court order and not any animus towards victim reduces the likelihood that victim's testimony generated in jurors an emotional bias against defendant. Thus, the trial court did not abuse its discretion in concluding the probative value of the evidence was not substantially outweighed by the probability that its admission would create substantial danger of undue prejudice.

D. Evidence of Defendant's Statement to Deputy Schumacher Prior to His Arrest

Defendant contends the admission of Deputy Schumacher's testimony that defendant told officers he knew why they were at his door early on the morning of July 6, 2010, violated his Fifth Amendment right against self-incrimination. We disagree.

" '*Miranda* . . . and its progeny protect the privilege against self-incrimination by precluding suspects from being subjected to custodial interrogation unless and until they

have knowingly and voluntarily waived their rights to remain silent, to have an attorney present, and, if indigent, to have counsel appointed.' " (*People v. Duff* (2014) 58 Cal.4th 527, 551.) Here, it is undisputed that defendant had not been *Mirandized* when Deputy Schumacher asked if he knew why police were at his home. At issue on appeal is whether defendant was in custody at the time of the exchange, such that the *Miranda* advisements were required.

"An interrogation is custodial . . . when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] Custody consists of a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. [Citations.] When there has been no formal arrest, the question is how a reasonable person in the defendant's position would have understood his situation. [Citation.] All the circumstances of the interrogation are relevant to this inquiry, including the location, length and form of the interrogation, the degree to which the investigation was focused on the defendant, and whether any indicia of arrest were present." (*People v. Moore* (2011) 51 Cal.4th 386, 394-395.)

"Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave.' " (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

Several factors convince us defendant was not in custody. He was standing on the doorstep of his own home during the incident. "[C]ourts have generally been much less likely to find that an interrogation in the suspect's home was custodial in nature" because "[t]he element of compulsion that concerned the Court in *Miranda* is less likely to be

present where the suspect is in familiar surroundings." (*U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1083 (*Craighead*); *Dyer v. Hornbeck* (9th Cir. 2013) 706 F.3d 1134, 1142 ["a suspect is far less likely to be intimidated or coerced into talking to the police when she [or he] is in the familiar surroundings of her [or his] own home"]; *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 675 ["absent an arrest, interrogation in the familiar surroundings of one's own home is generally not deemed custodial"].) That is not to say an interrogation in the defendant's home is never custodial. Indeed, in *Craighead*, the Ninth Circuit concluded the defendant was in custody where eight visibly armed officers entered his home to execute a search warrant and interviewed the defendant in a back storage room with the closed door guarded by an armed officer. (*Craighead, supra,* at pp. 1084-1089.) But defendant was not similarly confined here, leading us to conclude the location of the interrogation favors a finding that he was not in custody.

Moreover, at the time of Deputy Schumacher's question, defendant's wife was present and he had not been threatened with arrest. (*U.S. v. Griffin* (8th Cir. 1990) 922 F.2d 1343, 1352 ["A frequently recurring example of police domination concerns the removal of the suspect from the presence of family, friends, or colleagues who might lend moral support during the questioning and deter a suspect from making inculpatory statements, an established interrogation practice noted by the *Miranda* court."]; 2 W. LaFave, Criminal Procedure (3d ed. 2014) § 6.6(e) ["The view that at-home questioning is noncustodial is strengthened when the suspect's friends or family members were present at the time"].)

Finally, the interrogation was brief--it consisted of a single question posed immediately upon defendant answering the door.

Because we conclude defendant was not in custody at the time of his statement, we find no error in the admission of Deputy Schumacher's testimony.

E. *Testimony Regarding CSAAS*

Defendant urges us to hold that expert testimony regarding CSAAS is inadmissible for all purposes because it (1) invades the province of the jury to determine the alleged victim's credibility, (2) is irrelevant because jurors do not harbor misconceptions about how abuse victims behave, and (3) lacks diagnostic value such that it does not help the jury distinguish between abuse cases and false accusation cases. In addition, defendant contends the trial court erred in admitting such testimony because it was not addressed to any specific myth or misconception suggested by the evidence about how a child reacts to a molestation. He claims the error violated his due process rights.

i. Applicable Legal Principles

Expert testimony on CSAAS "is not admissible to prove that the complaining witness has in fact been sexually abused; it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident--e.g., a delay in reporting--is inconsistent with his or her testimony claiming molestation." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 (*McAlpin*).) Such testimony may be "used to disabuse the jury of common misconceptions concerning abuse victims," but only where (1) the testimony is "addressed to a specific 'myth' or 'misconception' " as to how abuse victims act that is "suggested by the evidence" and (2) the jury is admonished that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true, but is admissible solely to show that the victim's reactions are not inconsistent with having been molested. (*People v. Housley* (1992) 6 Cal.App.4th 947, 955 (*Housley*).)

A trial court's decision "to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' " (*McAlpin*, *supra*, 53 Cal.3d at p. 1299.)

ii. Analysis

Defendant claims that expert testimony on CSAAS should be deemed inadmissible because it invades the province of the jury by expressing an opinion on victim's credibility. He cites cases from other states that support this argument. But California courts have long rejected this argument and routinely permit the admission of CSAAS evidence, subject to the limitations set forth above. We see no reason to depart from this established case law. And, to the extent our high court has recognized that such evidence may be relevant, useful, and admissible in a given case (*McAlpin*, *supra*, 53 Cal.3d at pp. 1300-1301), as an intermediate court, we are in no position to depart from that precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, the record does not support defendant's suggestion that the jury improperly used the CSAAS evidence to mechanically credit victim's testimony. Jurors were instructed, among other things, that they alone must judge the credibility of witnesses and that they were not required to accept any opinions that witnesses (whether qualified as experts or not) might have offered. Their inability to reach a verdict on counts 1, 3, 5, and 8 indicates that they followed those instructions with respect to victim's testimony.

Defendant also urges that knowledge of sexual abuse has become so widespread in recent years that CSAAS no longer is a proper subject of expert testimony, as jurors no longer harbor any misconceptions about the behavior of child sexual abuse victims. The opinion testimony of an expert witness is admissible if it is, among other things, "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (§ 801, subd. (a).) " '[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission . . . . [E]ven if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common

knowledge that men [or women] of ordinary education could reach a conclusion as intelligently as the witness." ' " (*McAlpin*, *supra*, 53 Cal.3d at pp. 1299-1300.) The trial court did not abuse its discretion in concluding the CSAAS expert witnesses had considerably more knowledge about the behavior of child sexual abuse victims than the average juror such that their testimony would assist the jurors in understanding such conduct.

Next, defendant maintains that CSAAS evidence is improper because it cannot aid the jury in determining whether abuse occurred. But that is precisely why courts have required that jurors be instructed that the expert's testimony should not be used to determine whether the victim's molestation claim is true and is admissible solely to show that the victim's reactions are not inconsistent with having been molested. (*Housley*, *supra*, 6 Cal.App.4th at p. 955.) The jurors were so instructed here.

Finally, defendant objects that even if CSAAS testimony is admissible in some cases, it should not have been admitted here because it was not addressed to any specific myth or misconception about how children react to molestation, as case law requires. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394 ["it is the People's burden to identify the myth or misconception the evidence is designed to rebut"].) We disagree. "Identifying a 'myth' or 'misconception' has not been interpreted as requiring the prosecution to expressly state on the record the evidence which is inconsistent with the finding of molestation. It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.) Here, defendant's defense was predicated on attacking victim's credibility. He did so, in part, by pointing to behavior that supposedly was inconsistent with her allegations, including that she "was her normal and jovial self" on the evening of July 4, 2010, she continued to swim towards defendant even after he first placed her hand on his penis in the pool, and she sat on the couch with defendant after he digitally penetrated her. There also was evidence that victim delayed in reporting

earlier incidents of inappropriate touching. Accordingly, expert CSAAS testimony was properly admitted to rehabilitate victim's credibility. (*McAlpin, supra,* 53 Cal.3d at p. 1300.) For the same reasons, the admission did not render the trial fundamentally unfair in violation of defendant's due process rights.

F*. *Sanction for Discovery Violation

Defendant contends the trial court erred by refusing to instruct the jury that the hot tub incident never happened. He claims the trial court should have imposed that discovery sanction for the prosecution's failure to disclose victim's statement discussing the incident before trial. We disagree.

The prosecution is required to "disclose to the defendant or his or her attorney . . . . [¶] . . . [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." (Pen. Code, § 1054.1.) Penal Code section 1054.5, subdivision (b) provides, in relevant part, that where a party fails to comply with its statutory discovery obligation, "a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." "The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States." (*Id*., § 1054.5, subd. (c).) In determining the proper sanction, courts consider " 'the potential prejudice to the truth-determining function of the trial process . . .' " a particular sanction poses. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1757, quoting *Taylor v. Illinois* (1988) 484 U.S. 400, 415; see *People v. Superior Court* (*Mitchell*) (2010) 184 Cal.App.4th 451, 459 (*Mitchell*) ["Permitting trial courts to exclude witnesses' testimony as a sanction without first placing pressure on

the prosecution to produce discovery through lesser sanctions would undermine the search for truth."].)

"We generally review a trial court's ruling on matters regarding discovery under an abuse of discretion standard. [Citation.] In particular, 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to [a] violation of a discovery order.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) We find no abuse of discretion here.

The court selected a relatively harsh sanction for the discovery violation--namely, the exclusion of evidence of the hot tub incident. (*Mitchell, supra,* 184 Cal.App.4th at p. 454 [referring to exclusion as a "drastic" sanction]; Pen. Code, § 1054.5, subd. (c) [allowing exclusion as a sanction "only if all other sanctions have been exhausted"].) While it is true that victim testified to the incident, her testimony was brief and vague and the jury was admonished to disregard it. "Contrary to [defendant's] assertion[] that the jury would have been unable to follow the trial court's admonition not to consider the [testimony] . . . , we presume the jury followed the court's instructions not to do so." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 172.)

Defendant does not cite to a single case holding that instructing a jury that inculpatory testimony is false constitutes a proper discovery sanction. The one case on which he relies--*People v. Zamora* (1980) 28 Cal.3d 88, 101--is distinguishable. *Zamora* involved the destruction of records that may have led the defendant to impeachment evidence. The court there held that, as a discovery sanction, the jury should be instructed that the destroyed records would have been favorable to the defendant. Unlike in *Zamora*, here, the discovery violation did not prevent defendant from discovering favorable evidence. Defendant could have sought a continuance to muster evidence to disprove the hot tub allegation; he opted instead to have the testimony stricken. (Pen. Code, § 1054.5, subd. (b).)

Moreover, defendant's favored sanction would undermine the search for truth more significantly than did the sanction the court selected. An instruction that the hot tub incident did not occur effectively would have required jurors to conclude victim lied on the stand, which would have been an especially severe sanction given the importance of victim's testimony in this case.

For the foregoing reasons, we conclude the trial court did not abuse its discretion with respect to the discovery sanction it selected.

G. Cumulative Error

Defendant contends the cumulative effect of the trial court's claimed errors was to deprive him of his right to due process right under the federal Constitution. Under the "cumulative error" doctrine, we reverse the judgment if there is a "reasonable possibility" that the jury would have reached a result more favorable to the defendant absent a combination of errors. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 646; *In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32 ["Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial."].) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Having found no error, there is nothing to cumulate.

H. Sufficiency of the Evidence of Force

Defendant claims there is insufficient evidence he used force as required to support his convictions for aggravated sexual assault on a child by forcible oral copulation (Pen. Code, § 269, subd. (a)(4)) and two forcible lewd acts against a child (*id.*, § 288, subd. (b)).

"In considering defendant's claim of insufficiency of the evidence of force necessary to affirm his conviction . . . , we must determine only whether, on the record as a whole, any rational trier of fact could find him guilty beyond a reasonable doubt.

[Citation.] We view the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v*. *Griffin* (2004) 33 Cal.4th 1015, 1028 (*Griffin*).)

"[T]he definition of the word 'force' in sexual offense statutes depends on the offense involved. To convict for committing a forcible lewd act against a child in violation of [Penal Code] section 288, subdivision (b), the prosecution must prove that the defendant used physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself. [Citation.] In contrast, the requisite amount of force for a rape conviction is the amount sufficient to overcome the victim's will. [Citation.] This level of force also applies for convictions of aggravated sexual assault of a child by rape and by forcible oral copulation. . . ." (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200, fn. omitted; *People v*. *Guido* (2005) 125 Cal.App.4th 566, 576 ["the gravamen of the crime of forcible oral copulation is a sexual act accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury"].)

Thus, with respect to the forcible lewd act convictions, the question is whether the record contains substantial evidence that defendant used physical force substantially different from or substantially greater than that necessary to kiss victim and to lick her vagina. It does. Victim testified that defendant grabbed her arm and pulled her away from the door when he kissed her. That testimony is sufficient evidence of force, as one does not need to grab and pull someone's arm to kiss them. (*People v*. *Alvarez* (2009) 178 Cal.App.4th 999, 1005 [noting that courts have held that "acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves" constitute the requisite force].) Victim also testified that defendant pushed her down on the bed just prior to orally copulating her. And Deputy Schumacher testified that victim said defendant held her when he orally copulated her. Neither act of force was necessary to accomplish the lewd act.

Defendant relies on this court's decisions in *People v. Senior* (1992) 3 Cal.App.4th 765 (*Senior*) and *People v. Schulz* (1992) 2 Cal.App.4th 999 (*Schulz*) to argue that the evidence of force is insufficient here. In those cases, a panel of this court suggested that lewd acts with a child under age 14 "almost always involve some physical contact other than [the lewd act itself]" (*Senior*, *supra*, at p. 774) and "a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force' [beyond the force required for the lewd act]." (*Schulz*, *supra*, at p. 1004.) However, in *People v. Bolander* (1994) 23 Cal.App.4th 155, 160, a different panel of this court pointed out that the language in *Schulz* and *Senior* defendant relies upon was dicta because both cases affirmed the judgment based upon evidence of duress. *Bolander* also expressly "disagree[d] with the interpretation of the 'force' requirement of [Penal Code] section 288, subdivision (b) discussed in *Schulz* and *Senior*." (*Id.* at pp. 160-161.) Accordingly, defendant's reliance on *Schulz* and *Senior* is not persuasive.

As to the charge of aggravated sexual assault of a child by forcible oral copulation, the salient question is whether defendant accomplished the act of oral copulation "against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (*Guido*, *supra*, 125 Cal.App.4th at p. 576.) With respect to force, the question is "whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her [or his] attacker." (*Griffin*, *supra*, 33 Cal.4th at p. 1027.) Resistance is not a required element of the crime and " ' "force" plays merely a supporting evidentiary role, as necessary only to insure an act of [oral copulation] has been undertaken against a victim's will.' " (*Id.* at p. 1025.) For purposes of forcible oral copulation, duress means " 'a direct or implied threat of force, violence, danger, *hardship* or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.'

" (*People v. Leal* (2004) 33 Cal.4th 999, 1004, quoting *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50; see *id.* at p. 51 [noting that the *Pitmon* definition of duress has been applied to the crime of forcible oral copulation].)

As an aside, we note that neither of the parties addresses this standard. Defendant assumes the "force substantially different from or substantially greater than that necessary to accomplish the lewd act itself" standard applies. The People appear not to appreciate that defendant is asserting sufficiency of the evidence challenges, not only to his forcible lewd act convictions, but also to his conviction for aggravated sexual assault of a child. In the context of the forcible lewd act convictions, the People contend there is sufficient evidence of both force and duress.

The evidence, taken as a whole and viewed in the light most favorable to the jury's verdict, is sufficient to support the conviction of forcible oral copulation. Twice prior to the oral copulation defendant physically prevented victim from leaving the bedroom by grabbing her arm. Despite her pushing off against his chest, he forcibly kissed her and then physically moved her to the bed and pushed her so that she was lying down. There also was evidence he held her down just prior to the oral copulation. Victim testified that she was scared and covered her eyes. She told Deputy Schumacher defendant's size and strength scared her and that she did not know what to do. The jury could reasonably infer from the foregoing evidence that defendant overcame victim's will to resist the oral copulation by physically preventing her from leaving the room, ignoring her attempt to push him away, and forcing her down onto the bed. Having determined that the evidence of force was sufficient to support the forcible oral copulation conviction, we need not address whether there also was evidence of duress.

I. Penalty Assessments

The trial court imposed a $1,230 sex offender fine pursuant to Penal Code section 290.3. In its oral pronouncement of judgment the court stated, "I will impose the minimum under Penal Code Section 290.3 of $300. [¶] And I will also indicate then that

with that base fine amount of $300, penalty assessments are $870 and a 20 percent surcharge of $60, for a total of $1,230." The abstract of judgment reflects an order to "[p]ay fine of $1230.00 pursuant to PC 290.3." Nothing in the record sets forth the amount and statutory basis for each of the penalty assessments.

Defendant concedes that, at the time of his offenses (July 4, 2010), the correct amount of the Penal Code section 290.3 base fine was $300 for a first offense. He contends, however, that the trial court erred with respect to three of the penalty assessments associated with that base fine. First, defendant asserts the trial court erroneously imposed a 40 percent state-only DNA penalty pursuant to Government Code section 76104.7, when only a 30 percent assessment was authorized in July 2010. The People agree the state-only DNA penalty assessment should be 30 percent or $90, as do we. (Stats. 2009-2010, 8th Ex. Sess., ch. 3 (A.B.3), § 1, eff. June 10, 2010.)

Second, defendant argues the trial court imposed a 50 percent state court construction penalty under Government Code section 70372, subdivision (a), which must be reduced to 30 percent. For that argument, defendant relies on *People v. Voit* (2011) 200 Cal.App.4th 1353 (*Voit*), which in turn relied on *People v. McCoy* (2007) 156 Cal.App.4th 1246. As this court explained in *Voit*, "for a period of time Government Code section 70375, subdivision (b) authorized two potential reductions in the 50 percent state court construction penalty, [including] one [for] the amount collected for deposit into a local courthouse construction fund pursuant to Government Code section 76100 . . . ." (*Voit*, *supra*, at p. 1375.) It is this reduction defendant claims applies to reduce the state court construction penalty to 30 percent. However, on July 4, 2010, Government Code section 70375, subdivision (b) did not authorize that reduction. It authorized only a single reduction in the state court construction penalty "by the amount collected for transmission to the state for inclusion in the Transitional State Court Facilities Construction Fund established pursuant to Section 70401 to the extent it is funded by money from the local courthouse construction fund." (Stats. 2008, ch. 311 (S.B.1407), §

8.) Accordingly, we conclude a 50 percent state court construction penalty was correctly applied here. (Gov. Code, § 70372.)

Third, defendant claims the trial court imposed a 20 percent penalty for emergency medical services pursuant to Government Code section 76000.5 that may not apply in Monterey County. In reply, however, he concedes the penalty applies based on this court's analysis in *People v. Hamed* (2013) 221 Cal.App.4th 928 (*Hamed*). There, this court took judicial notice of the minutes of the May 15, 2007 meeting at which the Monterey County Board of Supervisors elected to levy the Government Code section 76000.5 assessment. (*Hamed*, *supra*, at p. 940, fn. 7.)

Finally, the trial court correctly imposed a $300 fine pursuant to Penal Code section 290. At the time of defendant's offenses, this $300 base fine was subject to the following penalty assessments: (1) a 100 percent state penalty assessment (Pen. Code, § 1464, subd. (a)(1)) equal to $300; (2) a 70 percent additional county penalty (Gov. Code, § 76000, subd. (a)(1)) equal to $210; (3) a 20 percent state surcharge (Pen. Code, § 1465.7) equal to $60; (4) a 50 percent state court construction penalty (Gov. Code, § 70372) equal to $150; (5) a 20 percent additional penalty for emergency medical services (*id*., § 76000.5) equal to $60; (6) a 10 percent additional DNA penalty (*id*., § 76104.6, subd. (a)(1)) equal to $30; and (7) a 30 percent additional state-only DNA penalty (former Gov. Code, § 76104.7) equal to $90. (*Hamed, supra*, 221 Cal.App.4th at pp. 940-941.) Thus, the correct amount of the penalty assessments is $900.

The imposition of a $300 base fine plus $930 in penalty assessments was an unauthorized sentence that may be corrected on appeal. (*Hamed*, *supra*, 221 Cal.App.4th at p. 941.) Since we may correct the error on appeal, there is no need to remand this matter to the sentencing court to orally pronounce the correct judgment. (*Id*. at p. 940.) Instead, we shall modify the judgment to reflect the correct penalty assessment amount and affirm the judgment as modified. (*Id*. at p. 941.)

In *Hamed*, which was decided after defendant was sentenced, this court held that the amount and statutory basis for each fine and penalty assessment must be enumerated in the judgment and listed on the abstract of judgment. (*Hamed*, *supra*, 221 Cal.App.4th at pp. 937-938.) Accordingly, we will direct the court clerk to file an amended abstract of judgment that lists the amount and statutory basis for the base fine and each of the penalty assessments that we order in this case. (*Id*. at p. 940.)

III. DISPOSITION

The judgment is modified to reduce the amount of the penalty assessments by $30 to $900. The clerk of the trial court is directed to prepare an amended abstract of judgment that sets forth the amount and statutory basis for the Penal Code section 290.3 fine and the amount and statutory basis for each associated penalty assessment, and to send a copy of the amended abstract to the Department of Corrections and Rehabilitation. The amended abstract shall specify the following penalty assessments that attach to the $300 Penal Code section 290.3 base fine: (1) $300 state penalty assessment (Pen. Code, § 1464, subd. (a)(1)); (2) $210 additional county penalty assessment (Gov. Code, § 76000, subd. (a)(1)); (3) $60 state surcharge (Pen. Code, § 1465.7, subd. (a)); (4) $150 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); (5) $60 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)); (6) $30 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); and (7) $90 additional state-only DNA penalty (former Gov. Code, § 76104.7, subd. (a)(1)).

As so modified, the judgment is affirmed.

Márquez, J.

WE CONCUR:

Rushing, P.J.

Elia, J.